

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE
January 22, 2008

**D051541 Arthroscopic & Laser Surgery Center of San Diego et al. v. The Superior
Court of San Diego County/Elery**
The petition is denied.

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January 22, 2008

D051055 People v. Varela

The judgment is affirmed. McConnell, P.J.; We Concur: Huffman, J., McDonald, J.

D050714 People v. MacKinnon

The judgment is affirmed. Irion, J.; We Concur: Nares, Acting P.J., Aaron, J.

D051881 Rebecca V. et al. v. Superior Court of San Diego County/San Diego County Health and Human Services Agency

No timely petitions for writ relief have been filed. The notices of intent are deemed to be abandoned. The case is dismissed.

D052154 Robert R. v. Superior Court of San Diego County/San Diego County Health and Human Services Agency

The attorney for petitioner Robert R. has notified the court that a petition for writ of mandate under California Rules of Court, Rules 8.452 and 5.600 will not be filed as there are no viable issues for writ review. The case is dismissed.

D051693 In re Locicero on Habeas Corpus

The petition for a writ of habeas corpus has been read and considered by Justices Nares, McIntyre and Aaron. We take judicial notice of the direct appeal D026479.

A jury found Louis Vincent Locicero guilty of attempted voluntary manslaughter and assault with a firearm, and found he had personally used a firearm and inflicted great bodily injury in the commission of these offenses. The court sentenced Locicero to the upper term of five years, six months for the attempted voluntary manslaughter conviction and a consecutive upper term of 10 years for the use of a firearm for a total term of 15 years, six months.

Locicero claims imposition of the upper, consecutive terms is unlawful, relying on *Cunningham v. California* (2007) 549 U.S. ____ [127 S.Ct. 856] ("*Cunningham*"). In *Cunningham*, the United States Supreme Court decided California's Determinate Sentencing Law (DSL) violates a defendant's right to a jury trial and proof beyond a reasonable doubt by allowing a judge to conduct fact finding on aggravating factors used to justify the upper term sentence. When a decision of the United States Supreme Court results in a "new rule," it is applied only in very limited circumstances to convictions that are already final. (*Schiro v. Summerlin* (2004) 542 U.S. 348, 352.) "[O]nly a small set of 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding' " are given retroactive effect to final cases. (*Id.* at p. 352.) Rules that allocate decision-making authority between a judge and jury are prototypical procedural rules. (*Id.* at p. 353.)

Cunningham does not apply to Locicero because his case was final before *Cunningham* was decided. (See *In re Consiglio* (2005) 128 Cal.App.4th 511, 516; *People v. Amons* (2005) 125 Cal.App.4th 855, 865.) *Cunningham* did not address consecutive sentences under the DSL which can be imposed based on facts found by the trial court. (*People v. Black* (2007) 41 Cal.4th 799.) The petition is denied.

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D050836 People v. Lacy

The judgment is affirmed. Haller, J.; We Concur: Benke, Acting P.J., O'Rourke, J.

D049648 Sanders v. Arcadia Financial LTD.

Sanders's appeal is dismissed. The parties shall bear their own costs on appeal. Aaron, J.; We Concur: Benke, Acting P.J., McIntyre, J.

D051820 People v. Dowell

Upon written request filed by appellant, the appeal is DISMISSED and the remittitur is ordered to issue immediately. (Cal. Rules of Court, rule 8.244(c)(2).)

D051819 People v. Dowell

Upon written request filed by appellant, the appeal is DISMISSED and the remittitur is ordered to issue immediately. (Cal. Rules of Court, rule 8.244(c)(2).)

D049821 People v. Smith

The judgment is affirmed. Irion, J.; We Concur: Haller, Acting P.J., Aaron, J.

D052027 Russell H. et al. v. Superior Court of San Diego County/San Diego County Health and Human Services Agency

The attorney for petitioner Leigha S. has notified the court that a petition for writ of mandate under California Rules of Court, rules 8.452 and 5.600 will not be filed as there are no viable issues for writ review. The case is dismissed.

D052129 Swain v. Superior Court of San Diego County/People

The petition is denied. The stay issued December 10, 2007 is vacated.

D052343 In re Michael T., a Juvenile

The notice of appeal is premature because no appealable order or judgment has been entered. The appeal is DISMISSED without prejudice to re-filing a notice of appeal after an appealable order or judgment is entered.

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE
January 24, 2008

D051713 In re Grimes on Habeas Corpus

The petition for writ of habeas corpus has been read and considered by Justices Nares, McIntyre and Aaron. We take judicial notice of San Diego County Superior Court file No. SCD 189996, petitioner's direct appeal No. D047240, and habeas petition considered with the appeal No. D048501.

A jury found petitioner guilty of false imprisonment (Pen. Code, " 236, 237, subd. (a)), forcible rape (' 261, subd. (a)(2)), battery with serious bodily injury (' 243, subd. (d)), rape by a foreign object (' 289, subd. (a)(1)), and attempting to dissuade a victim or witness from reporting a crime (' 136.1, subd. (b)(1)).

Petitioner appealed, and we appointed counsel to represent him in his appellate proceedings. This court affirmed the judgment in No. D047240. While his appeal was pending petitioner filed, in propria persona, a habeas petition that we ordered considered with the appeal. Petitioner challenged the trial court's pretrial orders prohibiting him from making telephone calls from jail, apparently contending those orders violated his constitutional rights to self-representation, access to the courts, and due process because he was unable to effectively communicate with his private investigator and otherwise prepare for trial. This court denied the petition, concluding petitioner did not submit or cite any evidence outside the record on appeal, and did not explain why he could not have raised his contention in that appeal. (In re Grimes (Oct. 24, 2006, D048501).) Petitioner then filed a habeas petition in the trial court arguing appellate counsel was ineffective in failing to challenge on appeal the trial court's revocation of telephone privileges. Petitioner claimed he asked counsel to raise the issue but she declined to do so because she believed the revocation order did not prejudice petitioner. On August 24, 2007, the trial court denied the petition because: (1) the revocation order was issued in response to petitioner's violation of a prior court order prohibiting him from contacting the victim by telephone, and was therefore not without justification; and (2) petitioner suffered no prejudice, especially in light of petitioner's insistence on proceeding to trial even though he had not seen his investigator, additional discovery was offered by the district attorney, and the court offered petitioner a continuance. Petitioner raises the same claim in this petition that he presented to the trial court: appellate counsel was ineffective in failing to challenge the trial court's telephone privilege revocation order.

To make a claim of ineffective assistance of appellate counsel, the petition must state facts and contain evidence to show: (1) the attorney's performance was deficient; and (2) the deficiencies prejudiced the appellate result. (Strickland v. Washington (1984) 466 U.S. 668, 687; Smith v. Robbins (2000) 528 U.S. 259, 285; In re Smith (1970) 3 Cal.3d 192, 202.)

Here, petitioner cannot show the appellate result would have been different had the issue been raised by counsel. Petitioner makes no showing the telephone privilege revocation order actually had any effect on his ability to work with his investigator. The court's order applied only to telephone privileges, and there is no showing petitioner could not communicate with his investigator through other common means of communicating with defendants facing trial, such as through confidential mail or jail visitation. Petitioner also fails to state what he would have

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had his investigator look into, and what further investigation would reveal. Moreover, petitioner's claim that the trial court's order somehow hampered his investigation is belied by his own actions and representations at trial. As the trial court examined in its order of August 24, 2007, denying the petition, the court minutes reveal the following:

"The Defendant states that he has not seen his private investigator since the end of May, but that he is still ready to go to trial. Counsel for the people state that they have additional Discovery, previously not disclosed to the defendant. . . . The defendant states that despite this, he is still ready to go to trial. The Court asks the defendant if he would like a continuance of the trial date. The defendant states he does not wish a continuance and wishes to go to trial today."

It is apparent that as of the day of trial, petitioner believed no further investigation was necessary, and even declined further discovery from the district attorney and the court's offer to continue the case. Had petitioner believed the court's revocation order was hampering his defense, he would have raised that before agreeing to proceed, and would have taken the extra time offered by the court to attempt to further communicate with his investigator or otherwise complete further preparation for trial. Petitioner therefore did not believe he was prejudiced the day of trial, and we decline to conclude he was prejudiced at this time, nearly two and one-half years after petitioner made his decision. Because petitioner cannot establish he was prejudiced, his claim of ineffective assistance of appellate counsel fails. (*Smith v. Robbins*, supra, 528 U.S. at p. 285.)

Finally, we note that petitioner elected to represent himself at trial, and we upheld on appeal the trial court's granting of petitioner's motion to represent himself. (*People v. Grimes* (Oct. 24, 2006, D047240) [nonpub. opn.].) The revocation of telephone privileges, and any alleged shortcomings in his investigation were caused by petitioner himself, and petitioner cannot premise a claim of ineffective assistance of counsel on his own actions. (*Faretta v. California* (1975) 422 U.S. 806, 834, fn. 46.)

The petition is denied.

D051293 CashCall, Inc. v. Superior Court of San Diego County/Cole et al.

The petition for writ of mandate is denied. Our stay of the trial court proceedings issued on July 27, 2007, is vacated. Because this is an interim proceeding, we do not award costs to either party. At the conclusion of the litigation, the trial court shall determine whether costs incurred in these writ proceedings should be awarded to either party. CERTIFIED FOR PUBLICATION. McDonald, Acting P.J.; We Concur: McIntyre, J., O'Rourke, J.

D049694 Lanier v. Mills et al.

The judgment is affirmed. Bank is entitled to costs on appeal. McDonald, J.; We Concur; Haller, Acting P.J., Aaron, J.

D051006 In re Angel S., a Juvenile

The orders are affirmed. McDonald, Acting P.J.; We Concur: McIntyre, J., Irion, J.

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January 24, 2008 (Continued)

D051240 In re Joshua G. et al., Juveniles

The order is affirmed. O'Rourke, J.; We Concur: Haller, Acting P.J., McDonald, J.

D050982 In re Julia S., a Minor

D051498 In re Julia S., on Habeas Corpus

The pending petition for writ of habeas corpus, *In re Julia S.*, D051498, is consolidated with the pending appeal *In re Julia S., a Minor*, for disposition.

D049681 Bunn v. Ferguson

The order appealed from is affirmed. Ferguson to recover his costs on appeal. Huffman, Acting P.J.; We Concur: Nares, J., O'Rourke, J.

D050833 People v. Lopez

The appeal is dismissed. Benke, Acting P.J.; We Concur: McDonald, J., McIntyre, J.

D048647 Ashford v. Goeppinger-Curran Development et al.

The orders and judgment are affirmed. Respondents are awarded their costs on appeal. McIntyre, J.; We Concur: Haller, Acting P.J., McDonald, J.

D051355 People v. Superior Court of San Diego County/Small

The petition is denied and the stay issued on August 3, 2007, is vacated. This opinion is final as to this court 15 days after it is filed. (See Cal. Rules of Court, rule 8.264(b)(3).) CERTIFIED FOR PUBLICATION. McIntyre, J.; We Concur: Haller, Acting P.J., O'Rourke, J.

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FOURTH APPELLATE DISTRICT
DIVISION ONE

January 24, 2008 (Continued)

D051773 In re Hoag on Habeas Corpus

The petition for a writ of habeas corpus has been read and considered by Justices Benke, Nares and Aaron.

Randolph Hoag states he is currently serving a life sentence without the possibility of parole after a jury convicted him of first degree murder with special circumstances and personal use of a firearm. He is currently housed at Calipatria State Prison in Imperial County. Hoag claims the Department of Corrections and Rehabilitation (DOC) Administrative Bulletin 91/15 (Bulletin) violates the Administrative Procedures Act (Gov. Code, § 11340 et seq.). The Bulletin issued in 2002 and, among other things, restricts inmate-requested transfers to same-level prisons in order to save costs of transportation. Hoag states the DOC has denied his repeated requests to transfer to Los Angeles County where his family resides.

A petition for a writ of habeas corpus will not lie to challenge the validity of a regulation. (See *Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 498 [complaint for declaratory and injunctive relief in superior court challenging the DOC's administrative bulletin regarding DNA testing].)

To the extent Hoag challenges his continued placement at Calipatria State Prison, the responsibility for the care and custody of prisoners is vested in the Secretary of the DOC. (Pen. Code, § 5054.) Based on a prisoner's classification, the Secretary "shall assign a prisoner to the institution of the appropriate security level and gender population nearest the prisoner's home, unless other classification factors make such placement unreasonable. [¶] As used in this section, 'reasonable' includes consideration of the safety of the prisoner and the institution, the length of term, and the availability of institutional programs and housing." (Pen. Code, §5068.)

The record shows Hoag's transfer request in 2006 was denied based on "extreme population pressures" and "budgetary constraints." The decision to deny Hoag's transfer in 2006 was not unreasonable. "It is not for the court to consider de novo or to second-guess or micromanage the Director's decision where to house prisoners. Those decisions are within the discretion of the Director acting under the statute and may be set aside only when discretion is abused." (*In re Rhodes* (1998) 61 Cal.App.4th 101, 108.) The DOC encouraged Hoag to "program and remain disciplinary free enhancing his possibility for transfer consideration to a facility closer to home upon later review." Hoag has not documented any application for a transfer at his annual review in 2007.

The petition is denied.

D052234 Armstrong et al. v. Scribner Warden, Calipatria State Prison et al./People

The petition for writ of mandate has been read and considered by Justices Benke, Nares and Aaron. The petition is denied.

D051686 In re Charity on Habeas Corpus

The petition is denied.

D052359 Oasis MSO Inc., et al. v. Superior Court of San Diego County/Ellery

The petition for writ of mandate and request for stay have been read and considered by Justices Benke, Huffman and Nares. The petition is denied.

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January 25, 2008

D052272 Parker v. Montes

The petition is denied.

D050145 Cress v. Superior Court of San Diego County/Board of Retirement

The petition for rehearing is denied.

D049107 Velazquez et al. v. Sharp Coronado Hospital and Healthcare Center et al.

The orders and judgment are affirmed as modified, to allow an appropriate credit for the July 10/13, 2006 posted payment as shown in the default prove-up declarations in the trial and appellate record. Upon return of the remittitur, the trial court is directed to prepare a modified judgment that will reflect such a credit. Costs on appeal to Sharp and Sharp Healthcare. Huffman, Acting P.J.; We Concur: Nares, J., O'Rourke, J.

D050749 In re R.B. et al., Juveniles

The opinion filed January 2, 2008, is modified. No change in judgment. The request for publication of the opinion is denied. Appellant's petition for rehearing is denied.

D049489 People v. Clark

Affirmed. Irion, J.; We Concur: Benke, Acting P.J., O'Rourke, J.

D051271 Berardi v. The Superior Court of San Diego County/People

The petition is denied. The stay of the preliminary hearing issued by this court on July 25, 2007, is vacated. McDonald, Acting P.J.; We Concur: McIntyre, J., O'Rourke, J.

D050950 In re William G. III, a Juvenile

The matter is remanded to the juvenile court with directions to (1) strike the maximum term of confinement references in the court minutes of the adjudication hearing, and (2) modify the probation condition restricting William's unsupervised association with children under the age of 12 to expressly include a knowledge requirement. In all other aspects, the order of wardship is affirmed. Nares, Acting P.J.; We Concur: Haller, J., McIntyre, J.

D051079 In re Antonio G., a Juvenile

The opinion filed December 28, 2007, is ordered certified for publication.

D052203 In re Gabriel L., a Juvenile

The petition is denied.

D052358 In re Brooking on Habeas Corpus

The petition is denied for petitioner's failure to provide an adequate record for review.

D052355 Ralph's Grocery Company et al. v. Superior Court of San Diego County/Peters

The petition is denied.

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D052132 Silvers v. Children's Angelcare Aid International

Because appellant did not timely pay the filing fee, the appeal is dismissed.